Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Review by Harrisburg City	)	
School District of March 3, 2009	)	CC Docket Nos.
Administrator's Decision on Appeal	)	96-45 and 02-6
Funding Year 2001-2002	)	
	)	
Form 471 Application Number: 256221	)	
Billed Entity Number: 125727	)	
FCC Reg. Number: 0013480892	)	

REQUEST FOR REVIEW OF HARRISBURG CITY SCHOOL DISTRICT

John Nakahata
Linda Coffin
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street NW, Suite 1200
Washington, DC 20036
(202) 730-1320

Counsel to the Harrisburg City School District

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Table of Contents

Summary

The Harrisburg City School District seeks review of USAC's decision to hold the school district – and its taxpayers, students and teachers – responsible for paying for the fraudulent acts of a criminal who bribed one of the District's employees to help that criminal defraud the Universal Service Fund. What the school district *is* responsible for is uncovering and reporting the fraud and working with USAC to help it recover improperly disbursed funds. The criminal enterprise was the sole recipient of the funds disbursed as a result of the bribery scheme. Thanks in no small part to the District's timely actions, the criminal enterprise was interrupted, and the criminals apprehended and brought to justice. When these criminals stood before the court for sentencing and judgment, USAC had an opportunity to obtain full, mandatory restitution, which the court would have been required to order. But USAC failed to seek full restitution, and then it failed to make any timely efforts to recover improperly disbursed funds from the actual recipient and its criminal owner. Now, USAC instead demands that another victim of the fraud – the District – pay the restitution USAC failed to obtain. USAC's assessment of responsibility is misplaced, which will only serve to harm the children in one of the poorest school districts in the country.

Having let the criminals escape full restitution, USAC now alleges that the school district should be held responsible for failing to foresee and stop these crimes. But USAC is using 20/20 hindsight to try to hold the District to a higher standard of foreseeability than USAC itself exercised, tantamount to strict liability – all to cover USAC's errors in failing to collect from the actual criminals. This is wholly unjustified, particularly when the school district detected the fraud and reacted immediately to

prevent further harm. Additionally, to the extent USAC is proceeding on a theory of vicarious liability, it wholly ignores well-recognized tenets of agency law that do not impose liability on an employer for the criminal acts of an employee that were clearly outside that employee's scope of employment and conferred no benefit on the employer whatsoever, but rather harmed the employer. In any event, USAC has failed to show that it has been reassigned the responsibility to collect this debt, which Federal Communications Commission rules require to be referred to the Department of Justice, and thus it lacks jurisdiction to seek recovery.

USAC's decision should be reversed because it is manifestly unjust and unsupported by law. The Harrisburg City School District should not be victimized twice – first through the honest services fraud of the criminal beneficiaries and then by USAC forcing the District to pay the proceeds of the fraud that USAC could have obtained from the criminals when they were in the dock for sentencing. Although USAC's failures now preclude an ideal resolution, this is the only result that is just and consistent with common sense and basic principles of agency law.

BEFORE THE
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Request for Review by Harrisburg City School District of March 3, 2009 Administrator's Decision on Appeal Funding Year 2001-2002	)	CC Docket Nos. 96-45 and 02-6
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REQUEST FOR REVIEW OF HARRISBURG CITY SCHOOL DISTRICT

In accordance with Section 54.721 of the Commission's rules (47 C.F.R. § 54.721), the Harrisburg City School District ("the District") hereby seeks review of the March 3, 2009, decision of the Schools and Libraries Division ("SLD") of the Universal Service Administrative Company ("USAC").[1] In that Decision, in an attempt to salvage recovery of improperly paid funds more than five years after the fact, SLD assigned to the District responsibility for a multi-million dollar "blatant bribery scheme to influence payments under government contracts" – even though the District was itself a victim of the fraud and in no way benefitted from it.[2] There is no question that the party

[1] Attachment 1 (Letter from USAC to John T. Nakahata (Mar. 3, 2009)("The Decision")). The District's appeal was filed on November 19, 2007. Attachment 2 (Harrisburg City School District's Appeal of the September 20, 2007 Notification of Improperly Disbursed Funds regarding Funding Request Number 639696 (filed November 19, 2007) (without attachments) ("Appeal Letter")); *see also* Attachment 3 (Supplement to Appeal of September 20, 2007 Notification of Improperly Disbursed Funds (Funding Year 2001) (filed April 2, 2008)).
[2] Attachment 4 (Excerpt from Sentencing Transcript of Ronald Morrett (May 16, 2005)), at 32.

principally responsible for this fraud – and its sole beneficiary – was one of the District's E-rate service providers, EMO Communications, whose owner and president paid nearly $2 million in bribes to the District's director of information technology to induce him to falsely certify that the District had received $5 million in services that were never delivered. But USAC failed to act diligently and in a timely manner to collect the proceeds of the fraud from EMO or its president, and USAC even allowed EMO's president, the criminal mastermind of the fraud scheme, to escape what would have been mandatory court ordered restitution of the entire loss that it now seeks to recover from the District. USAC should not now be permitted to cover its mistakes by concocting blame on the District. USAC's decision is erroneous as a matter of law, lacks a basis in the record, and would result in a manifest injustice if upheld – particularly because USAC's own failure to seek mandatory restitution of these funds from the criminal mastermind who executed and received the fruits of this fraud was a direct intervening cause of its failure to recover. While USAC's negligence and delays mean no ideal resolution remains available, the District respectfully requests that, under the unique circumstances of this case, either it be found not to be responsible for the violations – which occurred as a result of the service provider paying bribes to a District employee who then acted in a criminal manner wholly outside of the scope of his employment – or that recovery be waived on account of "hardship, equity, or more effective implementation of overall policy on an individual basis," pursuant to 47 C.F.R. § 1.3.[3]

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[3] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service*, WC Docket No. 05-337 & CC Docket No. 96-45, FCC 09-16, at ¶ 7 n.21 (rel. Mar. 5, 2009), *citing WAIT Radio v. FCC*, 418 F.2d 1153,1157 (D.C. Cir. 1969), *affirmed by WAIT Radio v. FCC*, 459 F.2d 1203 (D.C. Cir. 1972). *See also, e.g., Request for Review of the Decision of the Universal Service Administrator by Grand Rapids Public Schools,*

USAC's determination of responsibility rests on its claim – asserted for the first time in the Decision – that the District negligently failed to supervise its employee by failing to institute layers of review for its certifications that equipment and services were received. But this argument is just 20/20 hindsight. USAC itself did not foresee the possibility of a certification falsified due to bribery, and thus did not require that such certifications be countersigned – which would itself have created the "layered review" that USAC says should have been imposed. In any event, it is by no means clear that, if such layered processes had been in place, they would have deterred or detected the fraud in which the employee and service provider engaged – or would have prevented the false certifications to USAC. The fraud was furthered concealed because the false certifications claimed receipt of products and services that were to have been installed on laptop servers or provided as maintenance services after the District ultimately received the laptops servers.

By declaring the District responsible for the rule violation that led to the improper disbursement of funds, USAC is seeking recovery from the wrong party at the absolute worst possible time – in the midst of the greatest financial crisis since the Great Depression when the District is already operating at a $17.5 million deficit. The District is a convenient target for recovery because, unlike the fraud's beneficiary EMO Communications, it cannot go out of business and have its assets dispersed. But that convenient accessibility does not mean that it is fair or right to seek recovery from the District and its taxpayers, school children and teachers. USAC's Decision would victimize the people of Harrisburg not once, but twice, for the service provider's illegal

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Grand Rapids, Michigan; Schools and Libraries Universal Service Support Mechanism, 23 FCC Rcd 15413, 15416 n.27 (FCC Telecom. Access Pol. Div., 2008).

scheme. First, the service provider fraudulently deprived the District of the honest services of its employee by paying nearly $2 million in bribes, and causing the District to expend resources to uncover and respond to the fraud and its aftermath. Second, the District would then be required to pay USAC the proceeds of the fraud – all of which went to the defrauding service provider, none of which went to the District, and all of which the service provider's owner would have been required to pay to USAC had USAC timely alerted the Court as to its loss.

The Harrisburg City School District thus respectfully asks that USAC's decision be reversed, and that it be found, under these circumstances, not to have been a party responsible for the fraud.

I. Factual Background

A. The Bribery Scheme and Its Discovery

The District is among the most disadvantaged school districts in the nation. In 1999-2000, over two-thirds of its students performed below the basic level on the Pennsylvania System of School Assessment. Located in Pennsylvania's state capital, where nearly half of the real estate is government-owned and thus tax exempt, the District has always been extremely challenged. Ninety percent of children in the District live in poverty, based on the number of students who participate in free- and reduced-lunch plans under the National School Lunch Program; this percentage likely understates the poverty level of the District considering that many eligible students do not even complete the applications.

In December 2000, in an effort to reform this struggling urban school system, the Pennsylvania legislature authorized Harrisburg's Mayor to appoint a Board of Control to oversee the District. In July 2001, the Board of Control hired a new superintendent who in turn hired a new Deputy Superintendent in August 2001 and a new business manager in December 2001. At that time, John Weaver, a fifteen-year employee of the District, was the District's director of information technology. The District had also hired outside consultants, a firm called E-Rate Consulting, Inc., to advise it with respect to Schools and Libraries Support Mechanism (also known as "E-rate") compliance and to complete E-rate applications. One of the District's E-rate service providers was a local company called EMO Communications.

It was against this backdrop that Ron Morrett, the president and owner of EMO Communications, and John Weaver entered into their bribery scheme with respect to E-rate services. It is not clear precisely when the scheme began. In December 2000, the District posted its Form 470 to solicit proposals for its E-rate supported services for the July 1, 2001-June 30, 2002 school year. That Form 470 (Form 470 Application Number 213710000320520) listed John Weaver as the contact and also shows that Weaver certified the form for the District. The District also filed a Form 471 application in January 2001 (471 # 256221) listing Weaver as the contact person.[4] The application took a long time to be finally approved, but was ultimately granted.[5] USAC issued a Funding Commitment Decision Letter for Funding Request Number 639696 on April 19, 2002, providing a commitment of $6,150,760, for a pre-discount amount of $6,989,000.[6] EMO

[4] Attachment 5 (Form 471 for FRN 639696 (Jan. 18, 2001)).
[5] Initially, the application was denied. On June 6, 2001, the District filed an appeal, which was granted on February 8, 2002, which then allowed the application to proceed to Program Integrity Assurance Review. Attachment 6 (Letter from USAC to John Weaver (Feb. 8, 2002)).
[6] Attachment 7 (Letter from USAC to John Weaver (Apr. 19, 2002)). Apparently in response to questions from USAC, on April 9, 2002, Weaver sent USAC a memo stating

Communications was the service provider for the services provided under FRN 639696. Weaver then filed Form 486, which USAC approved on August 7, 2002, again reflecting the approved pre-discount amount and funding request amounts.[7]

By the time the April 19, 2002 Funding Commitment Decision Letter was issued, Morrett and Weaver had already embarked on their corrupt enterprise. Beginning on or about April 1, 2002, and continuing through May 23, 2003 (less than two weeks before the District discovered potential wrongdoing and suspended Weaver), Morrett made 12 payments to Weaver, totaling over $1.9 million.[8]

The bribes played a critical role in the scheme. Under USAC procedures for the E-rate program, Morrett's company, EMO Communications, was the service provider for FRN 639696, and accordingly submitted its invoices directly to USAC using a Service Provider Invoice Form (SPIF). However, before EMO Communications could be paid, USAC required the District to provide a signed Service Certification by the District, attesting that the equipment and services on the attached vendor invoice had been delivered and installed, along with a copy of the "detailed vendor invoice."[9] On October 30, 2002, Morrett submitted to USAC a SPIF falsely claiming to have delivered

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that the amount of the funding request was reduced from $8,802,776.00 to $6,989,500, with a reduction in the number of terminal servers from 1102 to 875. Attachment 8 (Memorandum from John Weaver to USAC (Apr. 9, 2002)). Also on April 9, 2002, Weaver sent another memo to USAC entitled "In Response to questions on FRN: 639696," explaining that the terminal servers would allow computers in every classroom to connect to the Internet under the control of the teacher, allow the teacher to control and monitor where students went on the Internet, and allow the teacher to control and monitor printing from the Internet from student workstations. Attachment 9 (Memorandum from John Weaver to USAC (Apr. 9, 2002)).

[7] Attachment 10 (Letter from USAC to Ronald Morrett (Aug. 7, 2002)).

[8] Attachment 11 (Criminal Information Filed Against Ronald R. Morrett, Jr. and John Henry Weaver (M.D. Pa. Dec. 8, 2003)) at ¶ 13.

[9] For an example of a Service Certification Form, see Attachment 12.

equipment and services to the District on September 15 and October 15, 2002, and attached false invoices.[10] On November 4, 2002, Weaver, who by this time had received over $670,000 in bribes from Morrett, falsely certified that the equipment and services had been delivered and installed on those dates, and sent that certification to the District's E-rate consultant, E-Rate Consulting, Inc., which apparently transmitted the certification to USAC.[11] Two days later, Weaver received another $35,000 bribe payment from Morrett.[12] USAC paid EMO $4.077 million in support for these invoices on November 22, 2002.[13]

Then, on January 23, 2003, Morrett submitted another SPIF falsely claiming to have delivered and installed equipment and services to the District on "01152002" (January 15, 2002), again accompanied by false invoices.[14] On January 29, 2003, Weaver, acting at Morrett's behest and interest, falsely certified that the equipment and services had been delivered.[15] Again, Weaver sent that false certification to the District's E-rate consultant, E-Rate Consulting, Inc., which apparently transmitted the certification to USAC.[16] USAC paid EMO another $2.073 million for these invoices on May 8, 2003.[17] Together, the amounts listed on these SPIFs and Service Provider Certifications

[10] Attachment 13 (Service Provider Invoice Form (Oct. 30, 2002)).
[11] Attachment 12 (Service Certification Form (Nov. 4, 2002)).
[12] Attachment 11 at ¶ 13.
[13] Attachment 7 to Attachment 14 (George McDonald Declaration, Attachment 7, attached to the Petition for Remission or Mitigation of Forfeiture dated March 30, 2005).
[14] Attachment 15 (Service Provider Invoice Form (Jan. 23, 2003)).
[15] Attachment 16 (Service Certification Form (Jan. 29, 2003)). Weaver does not appear to have faxed the certification to USAC until February 4, 2003.
[16] *Id.* Although the fax does not expressly state that it was sent to E-Rate Consulting, the fax number used is the same as for other faxes sent to E-Rate Consulting. *See, e.g.*, Attachment 12.
[17] Attachment 10 to Attachment 14 (George McDonald Declaration, Attachment 10, attached to the Petition for Remission or Mitigation of Forfeiture dated March 30, 2005).

appear to total the $6,150,760 in funds covered by the USAC Funding Commitment and Form 486 approval.

In fact, the equipment – laptop servers – were delivered, in various installments, between January 9, 2003 and June 2, 2003.[18] The District received 787 laptop servers from EMO, not the 875 stated on the EMO invoices. But EMO never provided installation of wireless antenna/testing, "upgrade 3/3/0 to 5/5/5, server burn in/load," or the five-year extended maintenance services for the antenna/server for any of the laptop servers. These would have had to have been installed on the laptop servers or, in the case of maintenance, provided after the fact. It is these latter services, and not the 787 laptop servers themselves, that are the subject of USAC's recovery effort and this appeal.

Morrett's and Weaver's corrupt scheme unraveled due to the persistent efforts of a District employee, Kim Cuff, who was in charge of teacher training. The laptop servers were originally scheduled to be delivered in September and October of 2002. Teacher training on the laptop servers was supposed to have been completed by January 2003, but Weaver repeatedly postponed or cancelled it, stating that he did not have enough space to store the laptop servers. On March 28, 2003, Cuff, who was supposed to run the training sessions, asked Weaver when they would be delivered. She received no response. Cuff emailed Weaver again on April 10, again asking when the laptop servers would arrive, and Weaver told her that they should arrive within two weeks.

Over the next two months, Cuff repeatedly attempted to contact Weaver to find out when the laptop servers would arrive, and Weaver either avoided her or lied to her. She also contacted Morrett, who also lied to her. Finally, on or about June 3, 2003, she

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[18] Attachment 17 (IntelliMark Invoices).

brought her concerns to her supervisor, an assistant Superintendent, and to the Business Manager. That same day, the District contacted the Harrisburg Bureau of Police regarding its failure to receive the laptop servers. The Harrisburg police in turn contacted the Federal Bureau of Investigation. The District immediately suspended Weaver, who resigned later that month, citing health reasons.[19] In October 2003, the District also terminated E-Rate Consulting, Inc., the consulting firm that Weaver had hired, and retained new consultants.[20]

The District thoroughly cooperated with the Justice Department's investigation, which resulted in the December 8, 2003 filing of federal bribery charges against Weaver and Morrett (EMO itself was not charged). In the press release announcing the charges, the Justice Department praised the District for its role in bringing the fraud to light and its cooperation during the investigation:

> In announcing the filing of this charge, [the U.S. Attorney and FBI Special Agent In Charge] emphasized that the current administration at the Harrisburg School District and the City of Harrisburg initially discovered this matter, brought it to the attention of federal authorities, and cooperated extensively with all aspects of the government's investigation into this kickback conspiracy. Federal officials praised city and school officials for their initiative in referring this matter and their complete cooperation in all aspects of this investigation.[21]

Weaver and Morrett both pled guilty.[22] Weaver and Morrett were ultimately sentenced to three years in prison. In his plea agreement with the United States, Morrett specifically acknowledged that, "pursuant to the Mandatory Restitution Act of April 24,

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[19] Attachment 18 (Letter from Julie Botel to John Weaver (June 4, 2003)); Attachment 19 (Letter from John Weaver to William Gretton (June 19, 2003)).

[20] The new consultants were Julie Tritt Schell and Debra Kriete, both well-recognized and reputed consultants.

[21] Attachment 20 (Press Release, U.S. Dept. of Justice, Middle District of Pennsylvania (Dec. 8, 2003)).

[22] A third member of the conspiracy, Mark Lesher, also pled guilty.

1996, Title 18 United States Code, Section 3663A, the Court is *required in all instances* to order *full restitution* to *all victims* for the losses those victims have suffered as a result of the defendant's conduct."[23] Weaver was not sentenced until March 1, 2005, and Morrett was not sentenced until May 16, 2005. Among all conspirators, the total restitution ordered to be paid to USAC was $2,164,956.12.[24]

B. USAC's Investigations

On or shortly after the day the charges were announced in December 2003, the District's new E-rate consultants (Tritt Schell and Kriete) contacted SLD Vice President George McDonald and SLD's fraud investigator, Ray Mendiola, to inform them about the charges and outline the District's cooperation with local and federal enforcement agencies. Tritt Schell and Kriete faxed a copy of the charging documents and the press release to USAC and asked that USAC immediately cease all payments to EMO. In January 2004, Tritt Schell and Kriete again contacted USAC and reminded them of the District's willingness to cooperate with USAC's investigation. In a March 29, 2004 letter to McDonald, the District provided USAC with a list of the steps it had taken to ensure that any pending and future requests for payments would be proper.[25]

SLD conducted its initial site visit in or about May 2004 to review EMO-related records. The District provided USAC with access to necessary records. The District also

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[23] Attachment 21 (Plea Agreement of Ronald Morrett (filed Dec. 8, 2003)), at 7 (emphasis added).

[24] Weaver and Morrett were ordered, jointly and severally, to pay restitution to USAC totaling $1,977,516. Attachment 22 (Judgment, *United States v. Weaver* (Mar. 1, 2005)); Attachment 23 (Judgment, *United States v. Morrett* (May 16, 2005)). The remainder was obtained from Mark Lesher. Attachment 24 (Judgment, *United States v. Lesher* (Apr. 22, 2005)).

[25] Attachment 25 (Letter from William Gretton, III, to George McDonald (Mar. 29, 2004)).

hired a computer forensics company to attempt to retrieve electronic files from Weaver's computer in order to provide those files to USAC's investigator.

USAC then, in February 2005, conducted a Site Inventory Audit. The District fully cooperated with the audit. As a result of that audit, on March 2, 2005, the District received Detailed Exception Worksheet #1, which stated that the District had received 787 laptop servers (valued at $1,250,373.91) that were not eligible for E-rate funding.[26] Detailed Exception Worksheet #1, however, did not address any of the other services or equipment not provided by EMO – and specifically did not address the services at issue in this appeal.[27] Nonetheless, we now know that USAC also contemporaneously concluded that it had improperly disbursed a total of $5,050,430.95 to EMO Communications for services not provided or for ineligible equipment.[28]

C. The Weaver and Morrett Sentencings

As noted above, John Weaver was sentenced on March 1, 2005. Although it had already completed its February 2005 Site Inventory Audit, USAC apparently did not convey to federal prosecutors the full magnitude of its loss from Morrett and Weaver's bribery scheme prior to Weaver's sentencing. Thus, the Court ordered Weaver to pay restitution for the amount of the bribes he received, jointly and severally with Morrett and any other co-conspirators.

It was not until March 30, 2003, nearly a month after Weaver's sentencing, that USAC sent a document entitled "Petition for Remission or Mitigation of Forfeiture" to

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[26] The District responded to Detailed Exception Worksheet #1 on March 30, 2005, arguing that the amount of restitution ordered against the three fraud conspirators should be credited toward any repayment obligation that the District might incur for the 787 laptop servers. Attachment 26 (Detailed Exception Worksheet #1 (Mar. 2, 2005)).
[27] *Id.*
[28] Attachment to Attachment 3 (Internal Audit Division Memo dated March 10, 2005).

federal prosecutors, informing them that it was a victim of Weaver's offenses. In that document, specifically captioned only with respect to Weaver and specifically referencing only Weaver's offenses, USAC stated that "it paid a total of $6,150,760 to EMO Communications for equipment and services that were not provided and for equipment that was not eligible for E-rate funding."[29] USAC further told federal prosecutors that it "intends to seek recovery of the balance of the funds not covered by the Court's Judgment that USAC has determined it paid for equipment and services that were not provided, and for equipment not eligible for E-rate Program funding -- $4,173,244 ($6,150,760 - $1,977,516) from EMO Communications and/or Harrisburg consistent with FCC rules and requirements and any other applicable law."[30] USAC, however, did not serve a copy of this Petition on the District, nor did it tell the District at that time that it was contemplating recovery from the District. USAC also did not file its petition with the Court.

USAC apparently never sent a similar petition to federal prosecutors in connection with to Ron Morrett's crimes or his sentencing, even though his sentencing had not yet occurred, and even though it was Ron Morrett who masterminded the bribery scheme and whose company received USAC's payments. In May 2005, Morrett came before the United States District Court for the Middle District of Pennsylvania for sentencing. At Morrett's sentencing (as it had at Weaver's), the District forwent any claim for restitution for itself, asking that all restitution be directed to USAC. The Court specifically found that "[t]he federal agency involved is the E-Rate program administered by the Universal Services Administration [*sic*], and the schools and library division of the

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[29] Attachment 14 at 1-2.
[30] *Id.* at 3.

Federal Communications Commission [*sic*], and this is the agency that is entitled to full restitution."[31] Although the Court took care to inquire as to full restitution, USAC did not inform the Court as to the full extent of the losses it had suffered as a result of Morrett's crimes, and prosecutors did not appear from their statements in open court to have been aware that USAC had suffered losses exceeding the $1,977,516 in restitution ordered by the Court in connection with Weaver's sentencing.

D. USAC's Belated Recovery Actions

After submitting its March 30, 2005 response, the District heard nothing from USAC for two and a half years. During this period, the District returned to the challenging task of educating its student body – one of the poorest in the country. It was not until September 20, 2007, that USAC issued the Notification of Improperly Disbursed Funds, stating that it was seeking to recover $2,885,474.96 jointly and severally from the District and EMO "for equipment and/or services that were not delivered to the applicant."[32] The Funding Disbursement Report attached to the Notification stated,

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[31] Attachment 27 (Excerpt from Transcript of Sentencing Hearing of John Weaver (Mar. 1, 2005)), at 44; *see also* Attachment 4 (Excerpt from Transcript of Sentencing Hearing of Ronald Morrett (May 16, 2005)), at 33. At the Weaver hearing, the Court was clearly referring to USAC and its Schools and Libraries Division, as well as the FCC, when it referred to the "Universal Services Administration" and "the schools and library division of the Federal Communications Commission." At Morrett's sentencing hearing, Morrett's attorney represented that EMO would forgive certain outstanding amounts allegedly owed to EMO by the District. That representation proved inaccurate, as EMO later initiated legal process against the District for outstanding indebtedness. No further action has occurred since the Writ of Summons was issued.

[32] Attachment 28. In a conversation with USAC's counsel, USAC clarified that the Notification of Improperly Disbursed Funds covered services that were not received, and not the laptop servers addressed by Detailed Exception Worksheet #1.

"USAC has determined that the applicant and service provider are responsible for this rule violation."[33]

The District appealed that decision to USAC on November 19, 2007, as contrary to both the facts, and to well-recognized principles of agency law that do not hold an employer liable for an employee's crimes that are outside the scope of employment and do not benefit the employer.[34] The District also pointed out that USAC's failure to seek mandatory restitution from Morrett meant that it was now seeking recovery from a victim while letting the principal beneficiary go free. The District further argued that USAC lacked jurisdiction because it has not asserted that the U.S. Department of Justice has returned to it the authority to pursue the collection of this claim.[35] USAC denied the appeal by letter dated March 3, 2009. This appeal follows.

ARGUMENT

II. USAC's Determination that the Distrcit Is "At Fault" and Responsible for the Disbursement of Funds for Services Not Received Ignores the Reality of the Bribery Scheme and Well-Established Principles of Agency Law.

USAC's determination that the District is responsible for the disbursement of funds for services not received – and its concomitant decision to seek recovery from the District – ignores the facts, ignores the Commission's guidance as to when an applicant should be determined to be responsible, ignores the law of agency, and ignores good old-

[33] Attachment to Attachment 28. The District does not know whether EMO Communications is a going concern or whether it is effectively judgment-proof. Assuming the latter, which seems likely for a small company whose president was sent to prison for bribery, USAC's request will fall entirely on the District's shoulders.
[34] Appeal Letter at 8, 10-12.
[35] The District also argued that USAC's Notification of Improperly Disbursed Funds was inadequate to permit sufficient response.

fashioned common sense. Indeed, USAC's determinations would further victimize the victim.

The District was a direct victim of the fraud perpetrated by John Weaver and Ron Morrett. At Morrett's behest, Weaver defrauded the District of his honest services and violated his fiduciary duty to the District by falsely certifying that the District had received services that were never provided – all for the benefit of EMO Communications. The plain truth was that, unbeknownst to the District, Weaver had ceased acting on the District's behalf and was acting instead on behalf of himself, Morrett and EMO. The stolen money went to EMO, not the District. With the exception of the bribes themselves – which went to Weaver – EMO and Ron Morrett were the sole beneficiaries of Morrett and Weaver's illicit enterprise with respect to the services for which USAC now seeks recovery in the Decision.

A. Ron Morrett and EMO Were the Parties Best Situated to Prevent the Violations.

As the Commission has set forth, "recovery actions should be directed to the party or parties that committed the rule or statutory violation in question."[36] In making that determination, USAC must consider "which party was in a better position to prevent the statutory or rule violation, and which party committed the act or omission that forms the basis for the statutory or rule violation."[37] The Commission gave examples of when recovery from a school or library would be appropriate, and when recovery from a service provider would be appropriate:

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[36] *Federal-State Joint Board on Universal Service; Changes to the Board of Directors for the National Exchange Carrier Association, Inc.; Schools and Libraries Universal Service Support Mechanism*, Order on Reconsideration and Fourth Report and Order, FCC 04-181, 19 FCC Rcd 15252 15255 ¶10 (2004) ("*Fourth Report and Order*").
[37] *Id.* at 15257 ¶15.

- Recovery against a *school or library* is appropriate if it "commits an act or omission that violates our competitive bidding requirements, our requirement to have necessary resources to make use of the supported services, the obligation to calculate properly the discount rate, and the obligation to pay the appropriate non-discounted share."[38]

- Recovery against a *service provider* is appropriate if it "fails to deliver supported services within the relevant funding year" or "fails to properly bill for supported services."[39]

Applying this guidance to the facts here, it is clear that EMO, the service provider, is the responsible party, along with its President, Ron Morrett. EMO "fail[ed] to deliver supported services within the relevant funding year" – indeed, it failed to deliver them at all. Furthermore, it was Morrett, EMO's principal, who paid Weaver to falsify his certifications and who himself submitted false SPIFs to USAC. EMO is clearly the party that "was in a better position to prevent the statutory or rule violation, and which committed the act or omission that forms the basis for the statutory or rule violation."[40] The District has been accused of none of the things that the Commission considers appropriate grounds for seeking recovery against a school or library.

USAC's bases for declaring the District to be jointly liable come down to two: that Weaver was the District's employee when he made the false certifications at the behest of Morrett, and that, purportedly, the District negligently failed to supervise its employee. Both these bases lack merit.

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[38] *Id.*
[39] *Id.*
[40] *Id.* at 15257 ¶15.

B. Basic Principles of Agency Law Preclude USAC from Holding the District Vicariously Liable for Weaver's Fraud.

In the Decision, USAC bases its finding that the District "was also in a position to prevent the rule violation" on the fact that "[t]hrough Weaver, the District certified to USAC on the Service Certification Forms that it received goods and services from EMO."[41] Moreover, USAC asserts, "Because [the District] authorized Weaver to sign funding requests submitted to USAC as well as the service certifications on its behalf, [the District] is found to have known that that [sic] the violations occurred and therefore is responsible for the violations."[42] In reaching these conclusions, however, USAC ignores the substantial body of agency law showing that Weaver's actions are not chargeable to the District where Weaver committed a crime for his own benefit and not for the benefit of his employer. The District presented this case law to USAC in detail,[43] which USAC has ignored entirely in the Decision.

Under agency law, even for negligence, an employer can only be held vicariously liable for the acts of an employee committed "*within* the scope of the employment."[44] The "core issue" when evaluating whether an employee's actions fell within the scope of

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[41] Decision at 2.
[42] Decision at 3.
[43] Appeal Letter at 10-12.
[44] *R.A. v. First Church of Christ,* 748 A.2d 692, 699 (Pa. Super. Ct. 2000) (citing *Fitzgerald v. McCutcheon*, 410 A.2d 1270, 1271 (Pa. Super. Ct. 1979)) (emphasis added). The agency issues in the instant dispute are governed by common-law agency principles, not the law of any particular state. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) ("In past cases of statutory interpretation, when we have concluded that Congress intended terms such as 'employee,' 'employer,' and 'scope of employment' to be understood in light of agency law, we have relied on the general common law of agency, rather than on the law of any particular State, to give meaning to these terms."). Pennsylvania courts, like most courts, follow the Restatement (Second) of Agency, which the Supreme Court has called "a useful beginning point for a discussion of general agency principles." *Burlington Indus. v. Ellerth*, 524 U.S. 742, 755 (1998).

his authority is whether he intended those actions to serve his employer. *Siemens Bldg. Tech., Inc. v. PNC Fin. Servs. Group*, 226 Fed. Appx. 192, 196-97 (3d Cir. Apr. 3, 2007) (refusing to impose vicarious liability when a corporation's employee forged payroll checks for her own benefit and later cashed them at the plaintiff bank). It is the plaintiff's burden to prove that the employee "was motivated 'at least in part, by a purpose to serve'" his employer. *Id.* at 196; *see also* Restatement (Second) of Agency § 228 (2004) ("Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or *too little actuated by a purpose to serve the master*.") (emphasis added).

In the instant proceeding, Weaver was plainly acting outside the scope of his employment, which USAC essentially concedes, stating "arguably [Weaver's] actions were outside the scope of employment."[45] Nothing he did was intended to, or did, benefit his employer – the District – in any way. He did not, for example, overbill the government, skim money off the top of the disbursement and give the rest to the District. Had he done so, his actions conceivably could have fallen within the scope of his employment, as the District would still have received some benefit from his actions. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 13 (1991) (affirming an insurance company's vicarious liability when its employee's actions, although unauthorized, economically benefited the company). But the District never received any of the services at issue in this Decision.[46] Nor did it receive any of the funds disbursed by USAC – all of

[45] Decision at 4.

[46] The Notification of Improperly Disbursed Funds specifically does not include the laptop servers that were also funded by FRN 639696. Those laptop servers were the subject of Detailed Exception Worksheet #1 and are not included in the Notification.

which went directly to EMO. EMO was the sole beneficiary of the fraud with respect to these services.

The Third Circuit has declined to hold an employer responsible for the acts of a rogue employee in circumstances strikingly similar to those at issue here. In *Estate of Beim v. Hirsch*, 121 Fed. Appx. 950 (3rd Cir. Feb. 11, 2005), David Hirsch concocted a check-kiting scheme (just as Morrett concocted the fraud scheme at issue in the instant matter). To help him carry out that scheme, Hirsch enlisted the help of a bank teller (just as Morrett enlisted Weaver). The teller would lie to potential victims of the scheme about the amount of money that Hirsch had in the bank; she would execute official cashier's checks on his account to assist with the scheme; and she would conceal any overdrafts that Hirsch made. *Id.* at 951-52. In exchange for this, Hirsch gave the teller approximately $7,000 in bribes. After the scheme was discovered, the victims sued the bank for which the teller had worked (among other parties), arguing the bank should be vicariously liable for its employee's participation in the scheme.

The district court granted summary judgment for the bank, stating that "vicarious liability could not be established where an employee's conduct 'would be "outrageously criminal" and "not in any sense in the service of the employer's interest."'" *Id.* at 953 (quoting *Gotthelf v. Prop. Mgmt. Sys., Inc.*, 459 A.2d 1198, 1200 (N.J. Super. Ct. App. Div. 1983)). The district court also noted that "[t]he fact that [the teller] received approximately $7,000 in gifts from Hirsch was additional evidence that [the teller's] illegal conduct was entirely in furtherance of her own personal interests." *Id.* The Third Circuit affirmed the district court's decision, finding ample evidence that the teller "was acting out of self-interest rather than a purpose to serve" the bank.

This case is on all fours with *Hirsch* and the many other cases holding that when a rogue employee acts for his own benefit, not the benefit of his employer, the employer should not be subjected to vicarious liability. *See also, e.g., Attallah v. United States*, 955 F.2d 776, 781-82 (1st Cir. 1992) ("Essentially, there must be some link between the intentional criminal act committed by the employee, and the legitimate interests of the employer."); *Shaup v. Jack D's, Inc.*, No. 03-5570, 2004 U.S. Dist. LEXIS 16191, at *4 (E.D. Pa. Aug. 17, 2004) ("Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or *too little actuated by a purpose to serve the master*.") (emphasis added) (internal quotation marks and citation omitted).

That principle applies with even more force here, where the District not only did not *benefit* from Weaver's actions, but was actually *harmed* by them. As a direct result of Weaver's fraud, the District was forced to expend scarce resources for outside investigation, legal representation with respect to the prosecutions of Morrett and Weaver, and forensic support for USAC's investigations. Those expenses have totaled more than $150,000 to date. In addition, the District had its legitimate E-rate support halted for over a year, creating hardship for itself and its innocent vendors. *See Todd v. Skelly*, 120 A.2d 906, 909 (Pa. 1956) ("Where an agent acts in his own interest which is antagonistic to that of his principal, or commits a fraud for his own benefit in a matter which is beyond the scope of his actual or apparent authority or employment, the principal who has received no benefit therefrom will not be liable for the agent's tortious act."); *Cover v. Cushing Capital Corp.*, 497 A.2d 249, 252-53 (Pa. Super. Ct. 1985). (refusing to impose vicarious liability when a broker-dealer's fraud scheme "was outside the scope of his employment and was antagonistic to his principal," and when his employer "had no knowledge of [his] personal machinations, which were calculated to line his pockets at the expense of his friends and customers"). To hold the District vicariously liable for Weaver's fraud would be to punish it twice for a crime that it did not even commit.

Finally, this is not a situation where vicarious liability can or should be established based upon an "apparent agency" or "aided by the agency" analysis, *see* Restatement (Second) of Agency § 219(2)(d). This case "involves misuse of actual power, not the false impression of its existence," making apparent agency analysis inapplicable. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 759 (1998). Similarly, cases applying "aided by the agency" analysis deal with "actions brought under very specific statutory schemes designed to govern sexual harassment and other employment-related claims." *Siemens*, 226 Fed. Appx. at 198. To apply that analysis to a fraud claim where the employee in no way acted to benefit his employer "would, in effect, strip certain prongs from the 'scope of employment' aspect of the *respondeat superior* test" and would constitute "a massive shift in the New Jersey law of agency" (which, like most courts, follows the Second Restatement). *Id.*

As a substitute for analysis, USAC argues that "in the context of the audit finding, [the District] did not dispute that it was bound by the improper conduct of its employee, John Weaver."[47] That assertion attempts to draw an admission from omission wholly out of context. The audit finding, Detailed Exception Worksheet #1, did not at all address the question of whether the District should be liable for the services and equipment in dispute

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[47] Decision at 4.

here: indeed, it did not address those services. The District's response to Detailed Exception Worksheet #1 was limited to the 787 laptop servers it did receive, for which USAC was questioning the E-rate eligibility. The District did not challenge Weaver's authority with respect to those 787 laptop servers, as it actually did receive them.

USAC's Decision fails to acknowledge any of this law of *respondeat superior*, which shows that Weaver's actions here are not chargeable to the District. Weaver essentially became Morrett's rather than the District's agent once he accepted the bribes. Accordingly, USAC erred by basing its finding of responsibility and knowledge of the false certification on Weaver's actions, which were solely for the benefit of himself and EMO, and not for the benefit of his employer.

C. USAC's New Assertion of Negligent Supervision is at Best 20/20 Hindsight that Would Require the District to Have Foreseen Criminal Acts that USAC Itself Did Not, and Lacks a Reasonable Basis in the Record.

In its Decision, USAC for the first time raises the rationale that the District should be held liable for the fraud perpetrated by one of its employees (Weaver) because it did not "deter" him from the crime, under a theory that the District negligently supervised its employee.[48] However, the mere fact of the commission of a crime, with nothing more, is not *res ipsa loquitur* evidence creating a rebuttable presumption of negligence on the part of an employer.

To support this new legal theory of negligent supervision, USAC cites a single case, *Mullen v. Topper's Salon and Health Spa, Inc.*, 99 F. Supp. 2d 553 (E.D. Pa. 2000), for the proposition that an employer can be held liable for negligent failure to supervise an employee that harms a third party if the harm is "reasonably foreseeable." Relying on

[48] Decision at 3 (USAC Response to "HCSD Argument 3").

this case, USAC asserts that "Weaver's actions were reasonably foreseeable because [the District] failed to exercise ordinary care to prevent the fraud by not having a process or layers of review in place to avoid such a fraud."[49]

But the facts here are not at all close to the facts that the district court in *Mullen* found sufficient to state a claim under state law for negligent failure to supervise. In *Mullen*, the plaintiff alleged that she had *notified* the employer of the ongoing harassment in the workplace after which time future harassment became "reasonably foreseeable." *Id.* at 556. The court's decision to let the claim proceed hinged on this allegation that the employer had reason to know about ongoing harassment "*after it was reported*" but did nothing about it. *Id.* at 556 (emphasis added). As support for the sufficiency of the employee's claim, the court cited the Restatement (Second) of Torts ¶ 317, which provides that an employer has a duty of reasonable care to control an employee acting outside the scope of his employment only if the employer "knows or should know of the necessity and opportunity for exercising such control." The notes to this section go on to explain:

> The mere fact that the servants are . . . misconducting themselves upon the master's premises is not enough to make the master liable. It is necessary to show that the master knew of the practices, and that he did not take the appropriate steps to stop them; or at least that he reasonably should have discovered them. *Id.*

Here, there is absolutely no suggestion that the District knew Weaver was receiving bribes and submitting false certifications but failed to act. Weaver had been a District employee for fifteen years; he was not a recent hire with whom the District had no experience. Weaver's malfeasance came to light because of the diligence of other

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[49] Decision at 4.

District employees. And once it suspected Weaver's malfeasance, the District immediately suspended Weaver and summoned law enforcement. Moreover, the District cooperated with law enforcement and USAC, by aiding law enforcement to act promptly to apprehend Weaver and Morrett, and by assisting USAC to determine the extent of its losses in a timely manner, before Weaver and Morrett had been sentenced.

Moreover, USAC's assertion that Weaver acted without review ignores the fact that the District did employ an independent contractor – E-Rate Consulting – to work with Weaver and to ensure compliance with E-rate rules.[50] The fraudulent certifications were, in fact, transmitted by Weaver to E-Rate Consulting, which then sent the certifications on to USAC. This outside contractor raised no concerns about the validity of the certifications or the District's processes.

Furthermore, USAC does not make clear how "layers of review" in this setting would have "deterred" or "prevented" Weaver from committing fraud, which by its nature involves intentional deception. In particular, this fraud involved the submission of fabricated invoices and certifications to USAC, handled not just by Weaver, but by the District's consultant. Furthermore, the services not delivered were ones that were supposed to be installed on the laptop servers, or provided after the fact, which makes them harder to deter through "layered review." The laptop servers themselves, after all, were actually – albeit belatedly – delivered. As additional support for USAC's assertion of negligence against the District, USAC recycles the argument that the District is responsible because John Weaver signed fraudulent certifications, in particular that his signature "certifying receipt of goods and services bound the District and formed the

[50] After the fraud was discovered, the District terminated these consultants and brought in a new team to review all of its E-rate applications.

basis of the rule violation." But that is a strict liability standard, not one based in negligence. And USAC itself apparently did not reasonably foresee these types of bribery schemes or the need for documented "layered review" when it designed the form beneficiaries used to certify receipt of supported services. Had it done so, and thought it effective, USAC would have required the countersignature of a second District senior employee on the certification form -- which it did not do. Simply stated, USAC is now applying 20/20 hindsight to hold the District to a higher standard of foresight that it exhibited itself.

USAC's assertion that the District negligently supervised Weaver does not withstand scrutiny on the facts of this case: there is no basis for concluding that the District had knowledge of Weaver's misdeeds and failed to stop them. USAC fails to support its conclusion with specific facts. USAC is, in reality, attempting to hold the District strictly liable for Weaver's misdeeds, which is not permitted by law. Accordingly, USAC's conclusion that the District engaged negligent supervision of Weaver should be set aside.

III. Holding the District Responsible When USAC Could Have Obtained Full Restitution from Morrett, But Failed to Do So, is Clearly Erroneous and Manifestly Unjust, and USAC Substantially Prejudiced the District's Ability to Protect Its Interests.

The Commission also should not find the District to be a responsible party under the unique circumstances presented here because USAC could have obtained full restitution from Morrett, the fraud perpetrator and president and owner of EMO, which received all the proceeds of the fraud. As the criminal mastermind and chief beneficiary stood before the United States District Court for the Middle District of Pennsylvania for sentencing and judgment, all that USAC had to do to ensure that he was divested of all the ill-gotten proceeds of his fraudulent scheme was to inform the Court that its losses exceeded the amounts of the bribes paid. But it did not do so, allowing the chief criminal to escape substantial and mandatory restitution. USAC's failure to seek full restitution from Morrett at the time of sentencing significantly prejudiced the District, particularly as EMO now appears to be judgment-proof. Moreover, USAC's more than two-year delay in even beginning to seek recovery from EMO – and its further unwarranted delay in actually billing EMO until just this month – has ensured that it will no longer be able to collect any funds from EMO.

The fact that more than $5 million in funds were disbursed for services not received as a result of Morrett and Weaver's fraudulent enterprise was clearly known to USAC prior to Morrett's sentencing, and likely even to Weaver's. The District notified USAC about the bribery scheme on or about the day that criminal charges were announced – December 8, 2003, as soon as the details were publicly known. The District provided copies of the indictments to USAC, which detailed the bribery scheme and the dates and amounts of the bribes. The District fully cooperated with both USAC site visits, including the site inventory audit conducted in February 2005, which was completed a month before Weaver was sentenced and more than two months before Morrett was sentenced. That audit was the only one conducted by USAC, and it is the apparent basis its finding that $5,050,430.96 was disbursed for services that were not provided. The District memorialized this knowledge in the memorandum it sent to federal prosecutors on March 30, 2005 with respect to Weaver's sentencing – which had already occurred.

The Decision fails to acknowledge the significance of USAC's knowledge and its subsequent failures to seek restitution. Under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. §§ 3663A, 3664 *et seq.*, the Court had no discretion to award less than full restitution.[51] USAC could have obtained the entire $5,050,430.06 that it now claims was disbursed for services not delivered, leaving no amount to be recovered from the District – and Morrett in his plea agreement had already acknowledged that he was required to pay all mandatory restitution.

Yet, inexplicably, USAC did not seek full restitution from Morrett as part of his sentence. Had USAC presented the court with the proof of its loss that it uses as the basis for the Decision – facts that were clearly in USAC's possession at that time – the Court would have had no alternative but to order Morrett to disgorge not just whatever portions of the bribes could not be disgorged from Weaver, but additional amounts to cover the fruits of the bribery scheme as well – all of which flowed to EMO and presumably through EMO to Morrett.[52]

In the Decision, USAC asserts that it informed "the government" on March 30, 2005 that it had paid EMO for ineligible equipment and services not provided.[53] Although it is true that USAC did, on March 30, 2005, submit to federal prosecutors a

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[51] *United States v. Lessner*, 498 F.3d 185, 201 (3d Cir. 2007) ("Under 18 U.S.C. § 3663A, *full restitution is mandatory* when an identifiable victim has suffered pecuniary loss and the defendant is convicted of 'an offense against property' under Title 18, including 'an offense committed by fraud or deceit.'") (quoting 18 U.S.C. § 3663A(a)(1), (c)(1)) (emphasis added); *United States v. Zakhary*, 357 F.3d 186, 189 (2d Cir. 2004) (stating that the MVRA "requires a court to order full restitution to the identifiable victims of certain crimes, including fraud, without regard to a defendant's economic circumstances").

[52] *See* Notification Letter, Funding Disbursement Report (Sept. 20, 2007) (reducing the total disbursed amount by the amount of court-ordered restitution to determine the recovery amount being sought here) (Attachment 29).

[53] Decision at 4.

Petition for Remission or Mitigation of Forfeiture, it did so only with respect to *Weaver's* already completed sentencing. It never submitted a similar petition with respect to *Morrett's* upcoming sentencing – even though Morrett was the recipient of all of the improperly disbursed funds and was the defendant who had yet to come before the court for final judgment. Moreover, although USAC told federal prosecutors that it might recover any additional amounts from the District, it did not so inform the District or the Court, either at that time or at the time of Morrett's sentencing.

USAC's failure to seek the additional restitution from Morrett, and even its failure to inform the District prior to Morrett's sentencing that it would seek recovery from the District, severely compromised the District's ability to protect its interests. At the time of the sentencing, the District had received no indication from USAC that USAC intended to seek to obtain the fruits of the fraud from the District, a fraud victim, rather than Morrett and EMO, the fraud beneficiaries. Thus, the District could not have submitted at Morrett's sentencing its own claim for restitution of the amounts that USAC would not demand until over two and a half years later.

USAC has further compounded the problem through its lack of timely pursuit of EMO itself. By waiting two and a half years to even issue its initial Notification of Improperly Disbursed Funds in 2007, USAC allowed EMO to go out of business – a result that was entirely foreseeable given that its president and owner was in jail. EMO does not appear to have responded to the 2007 Notification. Adding further insult to injury, USAC apparently stayed collection of amounts from EMO while it considered the District's appeal, and has only now issued its collection invoice to EMO.[54]

[54] Attachment 30 (Invoice from USAC to EMO Communications, dated March 6, 2009).

Under these circumstances, the Commission should find that USAC's own actions have severed any possibility that the District could be held responsible to pay for the violations perpetrated by Morrett, EMO and Weaver. The District discovered the potential wrongdoing, immediately reported the matter to law enforcement, assisted law enforcement and USAC fully, all of which resulted in criminal convictions that put USAC in the position to be able to claim mandatory restitution from the criminal perpetrators. But at that point, USAC fumbled, and failed to take the simple step of informing the Court that it had additional losses for which it was required by law to be awarded full restitution. It would be a gross injustice to now require the District, its schoolchildren, teachers and taxpayers, to bear the brunt of USAC's inattention and negligence.

IV. USAC Lacks Jurisdiction to Collect this Claim.

USAC's Decision must also be reversed because USAC has not established its jurisdiction to issue its Notice of Improperly Disbursed Funds and to pursue collection under the circumstances of this case. By Commission rule, claims of fraud are required to be referred to the Justice Department. *See* 47 C.F.R. § 1.1902(c) ("Claims... in regard to which there is an indication of fraud, the presentation of a false claim, or a misrepresentation on the part of the debtor or any other party having an interest in the claim, shall be referred to the Department of Justice (DOJ) as only the DOJ has authority to compromise, suspend, or terminate collection action on such claims.... [T]he Commission shall promptly refer the case to the Department of Justice for action."). After referral has been made, the Justice Department, "[a]t its discretion... may return the claim to the forwarding agency for further handling in accordance with the standards in the FCCS," *id.*, but that does not appear to have occurred here.

The District raised this jurisdictional issue directly in its appeal to USAC, pointing out that if the fraud claim at issue here has not been returned to the Commission, then Section 1.1902(c) makes clear that neither the Commission nor USAC are authorized to seek recovery from the District. It is only after referral and the subsequent, discretionary return to the Commission that the Commission – and by extension, USAC – have the power to pursue a fraud claim.

USAC failed to address this issue entirely in its Decision. Nothing in USAC's Notification or anything else in the record indicates that the Justice Department has returned the claim to the Commission. Even if Section 1.1902(c) were to be considered unclear in the instant context, USAC is specifically prohibited from interpreting it without first seeking guidance from the Commission, which there is no indication that it has done here. *See* 47 C.F.R. § 54.702(c) ("The Administrator may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission."); *In re Incomnet*, 463 F.3d 1064, 1072 (9th Cir. 2006).

V. Conclusion

The Commission in its review of USAC's decision cannot and should not find that the District is responsible for the disbursement of funds for services not received. At this point, this is not a case that presents any ideal resolution. Ideally, the improperly disbursed funds would have been recovered from Morrett and EMO, the clear beneficiaries of the fraud. But because of its negligence and inattentiveness, USAC allowed that principal beneficiary and mastermind of the criminal fraud to escape full restitution, and it prejudiced the District's ability to protect its own interests. At this juncture, the Commission's goal should be to make the findings that achieve the most equitable result under these unique and difficult circumstances.

The most equitable result is to find that the District was a victim of the criminal fraud perpetrated by Morrett, and is not responsible for the violations. When the District's employee falsified certifications that the District had received equipment and services from EMO, he clearly did so in response to Morrett's bribes, and thus wholly outside the scope of his employment. He was acting solely for his own benefit – and not the District's – in furtherance of the bribery scheme perpetrated by Morrett on behalf of EMO. In seeking to recover the fruits of the fraud from the District, USAC seeks to expand vicarious liability beyond the scope recognized by the courts.

Nor should the Commission endorse USAC's newly discovered theory of negligent supervision. USAC imposes on the District an expectation of foresight with respect to Morrett's criminal bribery enterprise that USAC itself did not exhibit when it designed the E-rate invoicing and certification forms – which did not require countersignatures. Moreover, the District did not allow Weaver to act alone, but had hired a consulting firm to oversee its E-rate compliance and to design its systems. Given the District's limited financial resources and extraordinary academic challenges, the District did its best to exercise due care. To suggest that the District should have prevented this illegal scheme, conducted by sophisticated criminals with nearly unlimited resources, is pure folly.

The $5 million in proceeds from this illegal scheme went somewhere – and the one place that everyone knows it didn't go is to the District. In concluding that the District is responsible for the violation, USAC seeks recovery from the wrong party. Accordingly, the Commission should overturn USAC's Decision that the District is responsible for the service provider receiving payment for services and/or products that were not delivered to the District.

Respectfully submitted,

John Nakahata
Linda Coffin
HARRIS, WILTSHIRE & GRANNIS LLP
1200 18th Street NW, Suite 1200
Washington, DC 20036
(202) 730-1320
Counsel to the Harrisburg City School District

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